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SUPREME COURT OF THE UNITED

OCTOBER TERM, 1938

No. 367

FRANK EICHHOLZ,

Appellant,

vs.

PUBLIC SERVICE COMMISSION OF THE STATE
OF MISSOURI ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR
THE WESTERN DISTRICT OF MISSOURI.

MOTION TO DISMISS.

JAMES H. LINTON,
✓ DANIEL C. ROGERS,
Counsel for Appellees.



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(Filed in United States District Court on July 27, 1938.)

Come now the appellees, by their counsel appearing in that behalf, and move the Court to dismiss the appeal in the above entitled cause, for the reason that this Court does not have jurisdiction thereof.

Suggestions in Support of Appellees' Motion to Dismiss.

The Court should dismiss the petition for appeal for two reasons, as follows :

- (1) Because the appellant relies wholly upon the unconstitutionality of Rule No. 44, promulgated by appellee Public Service Commission of Missouri, which is not dispositive of the case ;

(2) Because the judgment of the three-judge district court does not constitute a final judgment in said cause.

I. -

Appellant's statement of basis of appellate jurisdiction goes only to the constitutionality of Rule No. 44 promulgated by appellee Public Service Commission. From a casual inspection of the opinion and findings of fact and conclusions of law of the three-judge district court it is quite apparent that the determination of the constitutionality of Rule No. 44 is not dispositive of the case. The determination of the constitutionality of the order of the Public Service Commission, effective December 30, 1936, revoking the interstate common carrier authority of the appellant, is dispositive of the case. Rule No. 44 is only one of the fragments of the evidence upon which the aforementioned order of revocation was based. Rule No. 44 is only one of the fragments of the evidence upon which the judgment and decree of the three-judge court were based.

Appellant, therefore, does not preserve for the attention of this Court the question upon which its appellate jurisdiction turns, *i. e.*, the question of the character of the commerce involved. The case turns upon this question only. The opinion of the three-judge court clearly shows that there was evidence in abundance to sustain its finding that the character of the commerce involved was intrastate and not interstate. The three-judge court found that by unlawful manipulations and subterfuges appellant had conducted a motor carrier transportation business between two points in Missouri, namely, St. Louis, Missouri, and Kansas City, Missouri. Although appellant claimed such commerce to be interstate in character, the evidence proved it to be intrastate commerce. The court so found.

The introduction of Rule No. 44 was only a part of the evidence upon which appellees relied to prove the character of the commerce. True it was contended by appellees, and the court so held, that, in view of Rule No. 44, appellant motor carrier was not authorized under his Missouri irregular route interstate permit to pick up freight at one point in Missouri destined to another point in Missouri, even if in so doing he should drive his trucks for a short distance into another State. But, as stated heretofore, the constitutionality of Rule No. 44 is not dispositive of the case.

The three-judge court was within its right to dismiss the temporary injunction upon finding, as it did, that appellant had practiced numerous illegal manipulations and subterfuges in his transportation business in an effort to transform commerce that was truly intrastate in character into commerce that was interstate in appearance only. Therefore, even if the Court should find that Rule No. 44 is unconstitutional, which is not admitted as a fact, it would not reach the vital issues of law and fact upon which the case turns. The vital issues are determined only upon consideration of the constitutionality of the order of the Public Service Commission revoking appellant's authority, and the propriety of the dismissal of his Bill by the three-judge district court. Neither the constitutionality of the Commission's order of revocation nor the sustaining thereof by the lower court was dependent upon Rule No. 44.

In his statement of the jurisdictional grounds of this Court appellant has waived consideration of the order of the Public Service Commission revoking his authority. He stakes his case on the constitutionality of Rule No. 44 only. Since it is so apparent that a review of all of the evidence considered by the three-judge court in dismissing the injunction is essential to the determination of the issues involved, the appeal should be dismissed. It should be dismissed

because it does not preserve for the consideration of the Court those matters of fact and law which are necessarily dispositive of the case. It would be the doing of a useless thing for the Court to pass upon the constitutionality of Rule No. 44 only, since it is so obvious that the determination of the constitutionality of Rule No. 44 only is not dispositive of the case.

II.

The appeal should be dismissed for the reason that a final judgment, from which an appeal can be taken, has not been entered by the three-judge district court. Appellee Public Service Commission filed a counterclaim. The three-judge court has taken jurisdiction thereof and has assigned it to a special master for hearing. The issues thereon to be determined are judicial in character. The trial of the issues under the counterclaim will consist of the introduction and consideration of evidence to determine the amount of fees, for the use of the public highways of Missouri, payable by appellant to the State of Missouri during the period of time which the temporary injunction was in effect. These issues will be tried as a suit in equity and the amount of fees owing by appellant to the State of Missouri will be determined upon a judicial consideration of Sections 5264-5279, both inclusive, page 304, Laws of Missouri, 1931. Fees owing to the State of Missouri under the counterclaim are owing to it because the Federal court by its temporary injunction permitted, in effect, appellant to use the highways of Missouri without compensation therefor until the temporary injunction is dissolved. Stated another way, the court restrained the State from enforcing its order of revocation of appellant's irregular route interstate permit. Hence, the cause of action under the counterclaim is one in equity arising out of the transaction which is the subject matter of the suit.

The determination of the amount due the State of Mis-

souri under the counterclaim is a judicial question inseparable from the issues involved in the bill of complaint. Therefore, there is not a final judgment from which an appeal can be taken until the issues under the counterclaim are judicially determined. The Court will not allow an appeal by piecemeal.

Appellees respectfully submit that the appeal, for the foregoing reasons, should be dismissed.

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Missouri Public Service Commission,
Solicitors for Appellees.

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